

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
WEST VIRGINIA DEPARTMENT OF HEALTH)	File Nos. 0003970835; 0003970845;
AND HUMAN RESOURCES/STATE TRAUMA)	0003970965; 0003970968; 0003970971;
EMERGENCY CARE SYSTEM)	0003970976; 0003970979; 0003970983;
)	0003970984; 0003970985; 0003977301;
Request for Waiver of Applicable Eligibility)	0003993361; 0003993598; 0003996650;
Requirements to Permit Use of Multiple UHF)	0003996837; and 0003996931
Industrial/Business Pool Channels By a Public)	
Safety Radio Communications System)	

ORDER

Adopted: August 30, 2010

Released: August 30, 2010

By the Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. The West Virginia Department of Health and Human Resources/State Trauma Emergency Care System (“WVDH”) filed sixteen applications, each including an identical request for waiver,¹ pursuant to Section 1.925 of the Commission’s rules,² of Section 90.33 and such other Commission rules as may be necessary, to use various Industrial/Business (I/B) Pool frequencies in the UHF band for public safety communications.³ For the reasons stated below, we grant WVDH’s request.

II. BACKGROUND

2. WVDH currently operates a state-wide microwave network and transmitter sites that provides support for the West Virginia Interoperable Radio Project (“WVIRP”), a state-wide interoperable radio network comprised of a UHF digital Project 25-compliant, trunked radio system.⁴ According to WVDH, “there are approximately 7,332 radios operating on the system, from 530 different agencies, using 49 transmitter sites across the state with 25 additional sites that are in the planning and construction phase over the next 24 months.”⁵ In addition, according to WVDH, “[s]ince implementation

¹ See File Nos. 0003970835 (filed Sept. 22, 2009); 0003970845 (filed Sept. 22, 2009, and amended on April 13, 2010); 0003970965 (filed Sept. 22, 2009); 0003970968 (filed Sept. 22, 2009); 0003970971 (filed Sept. 22, 2009); 0003970976 (filed Sept. 22, 2009); 0003970979 (filed Sept. 22, 2009); 0003970983 (filed Sept. 22, 2009); 0003970984 (filed Sept. 22, 2009); 0003970985 (filed Sept. 22, 2009); 0003977301 (filed Sept. 25, 2009); 0003993361 (filed Oct. 9, 2009); 0003993598 (filed Oct. 9, 2009, and amended on April 30, 2010); 0003996650 (filed Oct. 14, 2009); 0003996837 (filed Nov. 2, 2009); 0003996931 (filed Oct. 14, 2009); and associated “Request For Waiver” (Waiver Request).

² 47 C.F.R. § 1.925.

³ In total, WVDH seeks to use ninety-four I/B Pool frequencies at multiple sites across the state of West Virginia. See File Nos. identified in note 1 *supra*.

⁴ See Waiver Request at 1.

⁵ *Id.* at 2.

in 2003, approximately \$56.8 million of Federal, State and local funding has been invested, with an additional \$20.7 million to be invested over the next 12 – 24 months.”⁶

3. WVDH indicates that the goal of WVIRP is to “provide at least six channels at each site to ensure adequate capacity for its diverse and expanding base of public safety users.”⁷ According to WVDH, it initially sought to satisfy these capacity requirements through Public Safety Pool frequencies, but was informed by APCO Automated Frequency Coordination, Inc., that there are not enough Public Safety Pool channels available to meet WVDH’s additional capacity needs.⁸ Because there were insufficient Public Safety Pool channels, WVDH worked with PCIA - The Wireless Infrastructure Association (PCIA), an I/B Pool frequency coordinator, for unassigned UHF channels that could be used by the WVIRP at the specified sites in the relevant areas of West Virginia, subject to appropriate waivers from the Commission.⁹

4. WVDH indicates that it did not consider non-UHF frequencies because such frequencies would not satisfy the WVIRP system requirements.¹⁰ In this regard, WVDH asserts that there currently is an “extensive, imbedded base of UHF transmitter sites and UHF mobile/portable radios” used on the WVIRP that “would not work on 700/800 MHz channels or on VHF channels.”¹¹ WVDH also argues that the “VHF band ... consists of unpaired channels and therefore would not meet the trunking requirements of the WVIRP,” and that “[i]ntegrating 700/800 MHz into the WVIRP infrastructure would also be a huge technical and financial challenge as the propagation characteristics of 700/800 MHz would be a poor fit for West Virginia’s unique geography.”¹²

5. WVDH seeks a waiver of Section 90.33 and such other Commission rules as may be necessary, pursuant to Section 1.925.¹³ In this regard, WVDH argues that a grant of its Waiver Request would “facilitate further deployment of a state-wide interoperable public safety radio network covering the unique terrain and remote communities of West Virginia.”¹⁴ WVDH also argues that “[a]pplication of the [I/B Pool channel eligibility restrictions] would also be inequitable, unduly burdensome, and contrary to the public interest as the frequencies in question are not currently assigned in the relevant areas of West Virginia.”¹⁵ Finally, WVDH argues that it has “no reasonable alternative as there are not enough Public Safety Pool channels in the UHF band to meet its requirements, and other frequency bands are not compatible with the WVIRP network or the geography of the area to be served.”¹⁶

⁶ *Id.*

⁷ *Id.* at 2-3.

⁸ *See* Waiver Request at 3. A copy of the APCO letter was filed with each application.

⁹ *See id.* A letter from PCIA certifying the availability of the I/B Pool channels requested by WVDH was filed with each application. *See, e.g.*, File No. 0003970976, Letter from Don Andrew, Director, Frequency Coordination Services, PCIA, to Wendy Caruthers, Engineering Coordination Specialist, APCO International, Inc. (dated Sept. 15, 2009) (filed on Sept. 22, 2009).

¹⁰ *See* Waiver Request at 3.

¹¹ *Id.*

¹² *Id.* WVDH asserts, more specifically, that “[s]cores (if not hundreds) of additional sites would be needed to provide 700/800 MHz coverage into the remote, heavily wooded valleys that can be found across the state.” *Id.*

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

6. On July 8, 2010, the Public Safety and Homeland Security Bureau issued a Public Notice seeking comment on WVDH's applications and Waiver Request.¹⁷ We received no comments or reply comments addressing the applications or the Waiver Request.

III. DISCUSSION

7. Section 1.925 of the Commission's rules provides that to obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: "(i) [t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the waiver would be in the public interest; or (ii) [i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative."¹⁸ Applicants seeking a waiver face a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.¹⁹ We evaluate the Waiver Request using the first prong of Section 1.925 below, and find that WVDH has met the prong one waiver criteria.

8. *Section 90.35.* As a starting point, we observe that the specific I/B Pool channel eligibility requirements set forth in Section 90.35(a) are more pertinent to the instant Waiver Request than the general eligibility requirements set forth in Section 90.33, and thus, on our own motion, we treat the Waiver Request as a request to waive the eligibility requirements in Section 90.35(a).²⁰

9. We find that granting the Waiver Request for the specified frequencies will not frustrate the underlying purpose of Section 90.35(a). The Commission consolidated the private land mobile radio services below 800 MHz into the I/B Pool and Public Safety Pools in 1997 in order to increase spectrum efficiency, increase licensee flexibility to manage the spectrum more efficiently, and reduce administrative burdens on users as well as the Commission.²¹ The Commission maintained a separate Public Safety Pool (as opposed to a single pool covering all users) to maintain the integrity of the critical functions of the users included within this pool.²² Based upon our internal spectrum usage analysis covering the geographic areas in issue, we conclude that authorizing WVDH's use of the I/B Pool frequencies it requested would not result in an inadequate supply of spectrum for the I/B Pool community, or otherwise result in spectrum inefficiencies.²³ We also observe that PCIA, apparently finding no interference concerns for other users, has approved of WVDH's proposed use of these frequencies.²⁴

¹⁷ See Public Safety and Homeland Security Bureau Seeks Comment on Request for Waiver Filed By the West Virginia Department of Health and Human Resources/State Trauma Emergency Care System of the Eligibility Requirements in Section 90.33 to Use Industrial/Business Pool Frequencies, *Public Notice*, DA 10-1277 (rel. July 8, 2010) (Public Notice).

¹⁸ 47 C.F.R. § 1.925(b)(3).

¹⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broad. Corp., Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

²⁰ Public Safety and Homeland Security Bureau staff discussed this correction with the applicant via telephone on August 26, 2010.

²¹ See Replacement of Part 90 By Part 88 To Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignments Policies of the Private Land Mobile Services, *Second Report and Order*, 12 FCC Rcd 14307, 14315 ¶ 15 (1997).

²² *Id.* at 14316 ¶ 16.

²³ In addition to frequency coordination, future non-I/B Pool eligible applicants seeking waivers to deploy multiple I/B Pool channels on a wide-area basis will be expected to demonstrate that a grant of their application(s) would not result in an inadequate supply of I/B channels in the relevant geographic areas for future I/B Pool eligible applicants.

²⁴ See *supra* note 9.

Further, no objection has been made by any other I/B Pool frequency coordinator against WVDH's proposed use of these frequencies,²⁵ and no objections were raised in response to the Public Notice.²⁶ In addition, because WVDH will be subject to the same technical requirements that apply to all other users of these I/B Pool frequencies, a grant of the Waiver Request should not result in any increased potential for interference to other users of these frequencies.

10. *Public Interest.* We find that granting the requested relief serves the public interest. WVDH's facilities are integrated into the WVIRP, which is expanding to provide state-wide interoperable communications to any public safety agency (Federal, state, county, and municipal) that operates in West Virginia.²⁷ As WVDH observes, a grant of the Waiver Request would "facilitate further deployment of [the WVIRP] covering the unique terrain and remote communities of West Virginia."²⁸ Given that the utilization of I/B Pool channels proposed by WVDH will promote interagency communication, and enhance the ability of public safety agencies in West Virginia to protect the lives and property in their care, we find that the public interest is served by affording WVDH access to the spectrum to which the Waiver request applies.²⁹

11. We note that this waiver is limited to the eligibility criteria set forth in Section 90.35(a).³⁰ WVDH's operations on the I/B Pool frequencies covered by this grant will be subject to all technical requirements that otherwise apply to operations on these frequencies, including any limitations that may apply under Section 90.35(c).

12. Based on the foregoing, we conclude that granting the instant applications would not frustrate the underlying purpose of Section 90.35(a) and is in the public interest. We therefore find that WVDH satisfies the first prong of the waiver standard set forth in Section 1.925. Accordingly, we grant WVDH a waiver of Section 90.35(a) pursuant to Section 1.925(b)(3) of the Commission's rules, to operate its public safety communications system on the I/B Pool frequencies identified in the above-referenced applications.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925(b)(3) of the Commission's rules, 47 C.F.R. § 1.925, that the Request for Waiver, as amended, associated with File Nos. 0003970835, 0003970845, 0003970965, 0003970968, 0003970971, 0003970976, 0003970979, 0003970983, 0003970984, 0003970985, 0003977301, 0003993361, 0003993598, 0003996650, 0003996837, and 0003996931, filed by the West Virginia Department of Health and Human Resources/State Trauma Emergency Care System IS GRANTED, to the extent indicated herein.

14. IT IS FURTHER ORDERED that File Nos. 0003970835, 0003970845, 0003970965, 0003970968, 0003970971, 0003970976, 0003970979, 0003970983, 0003970984, 0003970985,

²⁵ Under 47 C.F.R. § 90.176, coordination of these frequencies requires that all I/B Pool frequency coordinators be placed on notice of any proposed use of these frequencies.

²⁶ See *supra* para. 6.

²⁷ See WV Interoperable Radio Project, Frequently Asked Questions (Revised: 2 Jul 08), available at: <http://www.wvirp.com/documents/WV%20Interoperable%20Radio%20Project-%20FAQ.pdf>.

²⁸ Waiver Request at 4.

²⁹ See, e.g., 47 U.S.C. § 151 (one of the Commission's over-arching purposes is to "promot[e] safety of life and property through the use of ... radio communication.").

³⁰ 47 C.F.R. § 90.35(a).

0003977301, 0003993361, 0003993598, 0003996650, 0003996837, and 0003996931, SHALL BE PROCESSED consistent with this *Order* and the Commission's rules.

15. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers
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Public Safety and Homeland Security Bureau